



Notes from Intersector Meeting with the IRS/Treasury September 30, 2015

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Notes from the Intersector Group Meeting with the
Internal Revenue Service and U.S. Department of Treasury

September 30, 2015

Twice a year the Intersector Group meets with representatives of the U.S. Department of Treasury (Treasury Department) and the Internal Revenue Service (IRS) to discuss regulatory and other issues affecting pension practice. The Intersector Group is composed of two delegates from each of the following actuarial organizations: American Academy of Actuaries, Society of Actuaries, Conference of Consulting Actuaries, and ASPPA College of Pension Actuaries. Attending from the Intersector Group at this meeting were: Eli Greenblum, Eric Keener, Judy Miller, Heidi Rackley, Maria Sarli, Josh Shapiro, and Lawrence Sher. Matthew Mulling, Academy staff member supporting the Intersector Group, also attended.

These meeting notes are not official statements of the Treasury Department or the IRS and have not been reviewed by its representatives who attended the meetings. The notes merely reflect the Intersector Group's understanding of Treasury Department/IRS representatives' views expressed at the meeting, and are not to be construed in any way as establishing official positions of the Treasury Department, the IRS, or any other government agency. The notes cannot be relied upon by any person for any purpose. Moreover, the Treasury Department and the IRS have not in any way approved these notes or reviewed them to determine whether the statements herein are accurate or complete.

Discussion items:

1. New final funding rules under Internal Revenue Code (Code) section 430

- a. Logistics of standing/formula elections to apply funding balances toward quarterly contribution requirements

We discussed how the standing election described in Treasury Regulation section 1.430(f)-1(f)(1)(iii)(A) interacts with the replacement formula election described in Treasury Regulation section 1.430(f)-1(f)(1)(iii)(C). The Intersector Group indicated that a plan sponsor may determine the minimum required contribution for the current plan year, and the amount of that minimum required contribution may subsequently change due to a change in actuarial assumptions, the correction of an error, or other factors.

The IRS/Treasury representatives noted that there is only one minimum required contribution for the plan year, which is filed on the Schedule SB for that plan year. To the extent that other calculations are developed prior to the final minimum being determined, those calculations are only preliminary. The regulations do not anticipate that the minimum for the plan year will change once it has been determined and reflected in a replacement formula election.

- b. Logistics around standing elections when enrolled actuary changes

The Intersector Group indicated that there is a concern that a standing or formula election to apply funding balances toward quarterly contribution requirements

could be retroactively invalidated if the enrolled actuary changes between the installment due date and the date the Schedule SB is signed.

The IRS/Treasury representatives indicated that the election applies only to a single actuary, so the successor actuary needs a new election; if a plan sponsor makes a new standing election, it should be sent to the current enrolled actuary. They also noted that, while there has not been any formal guidance on what determines when there has been a change in enrolled actuary, their view is that it changes on the date a new enrolled actuary takes an action that may only be performed by the plan's enrolled actuary, such as certifying an AFTAP or signing Schedule SB. Once a change in enrolled actuary occurs, it applies prospectively and does not retroactively invalidate prior application of funding balances to quarterly contributions pursuant to the sponsor's standing election addressed to the prior actuary.

c. Clarification on mid-year plan termination treatment and Form 5500 filing

The Intersector Group noted that, under Treasury Regulation section 1.430(a)-1(b)(5), a terminating plan is treated as having a short plan year that ends on the termination date for purposes of Code section 430. This rule applies both for purposes of determining the amount of the minimum required contribution under Code section 430(a) and for purposes of determining contribution due dates under Code section 430(j). However, it is not clear from the regulations whether the year of termination should be treated as a short plan year for other purposes, such as the plan year dates shown on the Schedule SB and Form 5500.

The IRS/Treasury representatives agreed it was unclear what date should be shown as the last day of the plan year on Schedule SB and would work with IRS staff updating Schedule SB instructions to address this. The "short plan year" rule is for Section 430 purposes only and the plan continues to have a 12-month plan year for all other purposes (e.g., plan year dates shown on Form 5500, due date of Form 5500, date for reporting year-end asset values on Form 5500 Schedule H, etc.).

2. Hybrid plan transition rules — timing and effective date for final regulations

The Intersector Group indicated that it is very late for the regulations to be effective for plan years beginning on or after January 1, 2016, and that it is already past the cutoff date for many plan sponsors to be able to make administrative changes for 2016. Generally, six months of lead time are needed.

The IRS/Treasury representatives indicated that they have heard comments to this effect, and take those comments very seriously. They also noted that, while it would be possible to have the regulations be effective for plan years beginning on or after a date in 2016 other than January 1, they have not historically set regulatory effective dates in this manner, largely because of how the determination letter process works.

The Intersector Group also mentioned that there are a number of unclear issues in the final regulations, and that it would be helpful to have additional guidance on these issues including whether plans with whipsaw or early retirement subsidies in the lump sums can pass age discrimination using rules for indexed benefit plans; the consequences of too great an early retirement subsidy (the immediate annuity benefit for a younger worker being larger than for a similarly situated older worker); various questions surrounding return-based plans; etc.

3. Mortality tables

The Intersector Group expressed appreciation for the timely issuance of mortality guidance under Code sections 417(e) and 430 for 2016 plan years. The Intersector Group also noted certain practical difficulties that would arise if proposed mortality guidance for 2017 and beyond were to be issued between November 2015 and February 2016, when most companies are preparing their year-end financial statements. Specifically, if proposed mortality tables under Code section 417(e) were to be issued during this timeframe, company auditors could potentially require financial statements to be revised to reflect this information, even after the financial statements have already been prepared.

The IRS/Treasury representatives expressed some concern that delaying the proposed mortality tables to after February 2016 may make it difficult to have final regulations in place for 2017, and questioned whether it would be appropriate for the IRS to delay the release of proposed regulations based on potential company auditor reactions.

4. Changes in funding method

a. Current turnaround time for requests for approval

The IRS/Treasury representatives indicated that the turnaround time for requests for approval had improved for a while, but that the actuaries involved in reviewing these requests had been refocused on other efforts over the two months preceding the meeting with the Intersector Group and these efforts were taking up a lot of time (see the discussion on Knowledge Networks below). These efforts have been easing up more recently, so that the actuaries should be able to refocus on changes in funding method.

b. Outlook for Revenue Procedure for automatic approvals

The IRS/Treasury representatives indicated that they were well underway on updating Revenue Procedure 2000-40, and that they were trying to incorporate what they have learned from individual requests for approval that have been received. They indicated that they were trying to fine tune the scope of automatic approvals to balance the need for such approvals with considerations that may warrant an individual review. It is difficult to predict when the new Revenue Procedure may be published, as it can be challenging to get funding guidance

published. In the meantime, plan sponsors should continue submitting individual requests for approval.

5. Notice 2015-49 on Risk Transfers

The Intersector Group indicated that there is a need for clarification regarding the situations in which Notice 2015-49 does (and does not) prevent an acceleration of annuity payments to retirees and beneficiaries. Some practitioners have interpreted Notice 2015-49 as potentially applying to lump sums offered to retirees and beneficiaries in connection with a plan termination. In addition, it is unclear whether a lump sum option can be offered to certain categories of participants who receive annuity payments without having made an election, such as:

(1) Terminated vested participants who could not be located and were deemed to have elected a qualified joint and survivor annuity (QJSA) upon reaching normal retirement age in a plan that requires commencement at that date (these participants are typically allowed to elect other forms of distribution, once located, under EPCRS correction rules, including self-correction);

(2) Participants beyond NRD whose actuarially increased benefits exceed the IRC 415 3-year average compensation limitation who must therefore begin benefits, but for whom the situation is not discovered until later, and so they are deemed to have begun benefits in the QJSA form retroactively to when the benefits should have started (and, like the TVs discussed above, are often permitted to then select a different option under EPCRS correction rules, including self-correction); and

(3) Active participants working past normal retirement age or age 70-1/2 in a plan that requires in-service distributions to begin at that age to comply with the Code section 411 vesting rules and section 401(a)(9) minimum distribution requirements.

The IRS/Treasury representatives indicated that Notice 2015-49 was not intended to preclude the ability to offer lump sums to retirees and beneficiaries upon plan termination or, for individuals receiving in-service distributions, upon termination of employment. They felt the Notice was clear on this point and did not see the need to provide any further clarification pending publication of the proposed regulations. The IRS/Treasury representatives also indicated that they have begun working on the proposed amendments to the regulations under Code section 401(a)(9) discussed in Notice 2015-49, and that it would be helpful for comments on the proposed regulations to point out areas where clarification is needed, such as the case of missing participants deemed to have elected a qualified joint and survivor annuity.

With regard to the grandfathering of retiree lump sum programs where formal action had been taken as of July 9, 2015, the IRS/Treasury representatives asked whether there were any situations that were missed and where additional grandfathering might be needed. The Intersector Group noted that they were not aware of any such situations.

6. Change in role of IRS actuaries

The Intersector Group noted that it has been important for practitioners to have access to IRS actuaries on an informal basis when questions arise, and for IRS actuaries to be able to participate in the broader actuarial profession (e.g., via attendance at and active participation in actuarial organization meetings). The Intersector Group also indicated that it would be helpful to understand the role of IRS actuaries in the Knowledge Networks (K-Nets) being established within the IRS.

The IRS/Treasury representatives indicated that decreased participation by IRS actuaries in professional meetings has been driven by the IRS budget and a cutback in travel expenses, and is unrelated to any K-Net related reorganization. Other professional groups have been similarly affected. An IRS actuary cannot participate in a professional meeting as an IRS representative without the IRS covering his or her travel expenses. It may be possible for an IRS representative to participate in meetings that occur in a city where there is an IRS office. This would need to be accomplished via a formal invitation, and coordinated with the communications liaison for the Tax Exempt and Government Entities (TEGE) division. It might also be possible for an IRS actuary to participate in a professional meeting by phone since no travel expenses would be involved.

The IRS/Treasury representatives described K-Nets as a major “knowledge management” initiative to develop a centralized base of resources and processes across each of the major operating divisions of the IRS, and to ensure that consistent positions are taken across the organization, including by field agents. IRS actuaries are performing the same functions as in the past, but each is also assigned additional functions and responsibilities for one of three K-Nets (defined benefit; cash balance; and a specialty KNET that covers 403(b), multiemployer and government plans). Practitioners should continue to have access to them as in the past, but there is a concern that answering questions on an informal basis may take up too much of their time, and it was noted that the e-mail address to which questions could be directed has been discontinued. A major function of the K-Nets will be serving as a central point for receiving and responding to questions from the field. The K-Nets are still at an early stage, and will take years to complete, but the goal is for them to benefit both the IRS and practitioners. There may be a way of making some of the information the K-Nets develop available outside the IRS firewall at some point, such as through postings on the IRS public website, although the K-Nets are not being designed with that goal in mind.

7. Hybrid plans – outlook for additional guidance

The IRS/Treasury representatives requested input on additional areas where hybrid plan guidance may be needed after the 2014 proposed transition regulations for interest crediting rates are finalized.

The Intersector Group indicated that, while there are open issues for pension equity plans, the specific nature of these issues varies from plan to plan and may be difficult to address in guidance of general applicability. Other areas where guidance is needed include funding and lump sum calculations for variable annuity plans, and projection

issues for hybrid plans with investment-based interest credits (including projections for funding, accrual rules, Code section 415, and nondiscrimination testing purposes). These issues are expected to affect more new plans than the pension equity plan issues would.

8. Combined effect of curtailing determination letter program and limiting other informal guidance

The Intersector Group noted that there is a concern about the combined effect of curtailing the IRS determination letter program while also limiting access to informal guidance that might otherwise help a plan sponsor identify potential plan compliance issues. This could result in these issues remaining undiscovered for a longer period of time, and make corrections more difficult at a later date.

The IRS/Treasury representatives indicated that this is a concern they are aware of, and that it has been brought up by other practitioners as well. In the process of developing the parameters for the remedial amendment period and the determination letter process in the future, consideration will be given to whether there are certain types of plans or plan design changes for which a determination letter filing should be allowed. There is sensitivity within TEGE that, if issues are discovered on exam after several years, there need to be reasonable approaches to dealing with these issues, recognizing that there is no longer a determination letter cycle that would allow issues with plan language or design to be identified. There has been discussion as to whether reviews or opinion letters by outside legal counsel could “stand in” for the current program. IRS thinking on these issues will evolve over time—much like EPCRS has evolved—and they expect the program will be tweaked to get it right. The current program will remain in place until early 2017; at that point, all plan sponsors who have filed in a timely manner will have a determination letter that is no more than five years old, so there is time to address these concerns.

9. Plan termination issues

a. Difficulty finding suitable annuity carriers when small- to mid-sized plans terminate

The Intersector Group noted that some smaller terminating plans are having difficulty finding annuity providers willing to bid on termination annuity contracts, particularly for active or terminated vested (TV) participants. Larger carriers sometimes indicate that capacity is an issue, or they may not be willing to underwrite actives and TVs since retiree-only deals are more attractive and they can often fill their internal quotas completely with such deals. This can lead to questions about whether the plan is still considered to have been terminated, since plan assets must be distributed as soon as is “administratively feasible” following the termination date. It has been suggested that the PBGC could potentially assume the liability for participants when an annuity provider is not available, but this would likely require a statutory change. The Intersector Group also noted that smaller plans sometimes have complicated optional forms, and

having some way of eliminating those forms for terminating plans (as under current regulations, but without a four-year wait) could be helpful to plan sponsors in carrying out the termination.

The IRS/Treasury representatives indicated that they have received some practitioner questions about these issues. It may be possible for future guidance to clarify whether it would meet the “distribute as soon as administratively feasible” requirement for a plan to retain assets and liabilities for plan participants until a suitable annuity carrier is found. (Also see Notes from September 30, 2015, Intersector Meeting with PBGC.)

b. Problem of well-funded 401(h) accounts in plan terminations

The IRS/Treasury representatives didn't offer any suggestions on this issue.

10. Timing of final version of proposed and temporary regulations under the Multiemployer Pension Reform Act of 2014 (MPRA); reaction to comments submitted and public hearing

The IRS/Treasury representatives indicated that they have received comments on the regulations from many different sources. Some practitioners testified at the public hearing, and many affected individuals also testified.

The Intersector Group noted that, for the most part, the proposed benefit suspension regulations were well received by practitioners. The American Academy of Actuaries submitted comments suggesting a more streamlined application process and other technical concerns. Plan sponsors who have applied for benefit suspensions (or are in the process of doing so) are concerned that they may need to reapply based on any changes in the final regulations, and some sponsors who are considering applying are reluctant to do so under the proposed regulations.

A second set of proposed regulations has been issued related to participant voting procedures (comments were due by Nov. 2). Both sets of regulations are expected to be finalized at the same time, but IRS/Treasury expect to be working on issues related to the first set of regulations while waiting for comments on the second set of regulations. No benefit suspensions are expected to be approved until after the regulations are finalized, and no completed suspension applications had been received 30 or more days prior to the meeting with the Intersector Group.

11. MPRA and amortization extensions under Code section 431(d)

The Intersector Group noted that MPRA can forcibly eject some multiemployer plans from critical status into endangered status due to the new Special Emergence provisions. This could disrupt recovery based on the rehabilitation plan. As a result, some plan sponsors are interested in revoking an amortization extension that had previously been granted under Code section 431(d) to remain in critical status. While improving benefits would accomplish this result, this seems contrary to what such plans

should be doing based on their funded status. Such plans have an incentive to remain in critical status, as this could enable a faster recovery.

The IRS/Treasury representatives indicated that they have not focused on aspects of MPRA other than benefit suspension, and that they have not yet received a private letter ruling (PLR) request on this issue. Modifications to amortization extensions have been granted in other PLRs, and this might be a possible approach for plan sponsors concerned about this issue. Revoking an amortization extension could result in a significant charge to the funding standard account, but this might not be a concern for plan sponsors in critical status due to relief from the excise tax on funding deficiencies.